No. 81-1146

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

TANDY RICHARDSON, JR., Administrator of the Estate of BYRON L. RICHARDSON, Deceased,

Petitioner,

-vs-

THE CITY OF INDIANAPOLIS, A Municipal Corporation in the State of Indiana; MARION COUNTY SHERIFF'S DEPARTMENT, Marion County, Indiana; MARK MYLER, ROBERT YARNELL, SCHUYLER ATKINS and LINDEN K. LUCAS, Individually and as Deputy Sheriffs of the Marion County Sheriff's Department, Marion County, Indiana; INDIANAPOLIS POLICE DEPARTMENT, Indianapolis, Indiana; RICHARD BLAKE, Individually and as a Police Officer of the Police Department of the City of Indianapolis; and PHIL SMITH and ROBERT FOUTY, Individually and as Police Officers of the Police Department of Speedway, Indiana,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether prejudicial error resulted from the trial court's granting a directed verdict for Respondents Smith and Fouty on one of Petitioner's theories of relief.

PARTIES

All parties are identified in the caption.

TABLE OF CONTENTS

PAGE:

Question Presented for Review i

Parties i

Table of Authorities ii

Decisions Below 1

Jurisdiction 1

Statement of Facts 1

Argument Regarding Question Presented 1

Conclusion 3

Appendices

Appendix A A-1

Appendix B B-1

TABLE OF AUTHORITIES

PAGE:

Arnold v. International Business Machines, 637 F. 2d 1350 (9th Cir., 1981) 2

Beard v. Mitchell, 604 F. 2d 485, (7th Cir., 1979) 2

Black v. Stevens, 662 F. 2d 181, (3rd Cir., 1981) 2

Murphy v. United States, 653 F. 2d 637, (D.C. Cir., 1981) 2

DECISIONS BELOW

Respondents Smith and Fouty accept Petitioner's version of the decisions below.

JURISDICTION

Respondents Smith and Fouty accept the Petitioner's statement of jurisdiction as it relates to jurisdictional issues but not as it relates to substantive issues.

STATEMENT OF FACTS

Respondents Smith and Fouty adopt and incorporate as if set out herein the Statement of Facts of co-respondents City of Indianapolis, et al., set forth in their opposition brief, with the following addition:

The Respondents Phil Smith and Robert Fouty were separately operating their marked police cars for the City of Speedway, Indiana. Each had entered the pursuit of the fleeing Richardson automobile to assist a fellow law enforcement officer, and observed the Richardson vehicle speeding, operating recklessly, etc. Richardson failed to stop when they signaled him to do so by operation of their red lights. When the Richardson vehicle was finally stopped by the blockade on the exit ramp at the Indianapolis International Airport both Smith and Fouty stopped their police cars some distance behind the Richardson vehicle, stepped from their vehicles without drawing their firearms and did not at any time draw their firearms or participate in removal of Richardson from his automobile.

ARGUMENT REGARDING QUESTION PRESENTED

The Respondents Phil Smith and Robert Fouty would adopt, as part of their Brief in Opposition to Petitioner's Petition for Writ of Certiorari, the arguments of the co-

respondents. Smith and Fouty further contend that the lower courts correctly formulated the proximate cause standard and made the appropriate distinction between cause in fact and proximate cause. The standard utilized in the case at bar does not differ from that utilized in other Federal Circuits cited by the Petitioner in his brief. *Black v. Stevens*, 662 F. 2d 181 (3d Cir., 1981); *Murphy v. United States*, 653 F. 2d 637 (D.C. Cir., 1981); *Arnold v. International Business Machines*, 637 F. 2d 1350 (9th Cir., 1981). These cases illustrate the application of the accepted legal standard to varying fact situations. The standard used in determining proximate cause is consistent among the Federal Circuits. *Beard v. Mitchell*, 604 F. 2d 485 (7th Cir., 1979). The law requires that before one is entitled to recover, the wrong complained of must be the proximate cause of the injury sustained and not merely a cause in fact. Thus, while it may be true that the particular scene at the Indianapolis International Airport during the early morning hours of May 14, 1975 would not have occurred had the police officers given up their pursuit and gone home, the pursuit did nothing more than to place the parties on the scene at the time and place and could not have been a proximate cause of Byron L. Richardson's death. The shot which killed Richardson was not fired *during* the high speed chase as the Petitioner seems to imply in his statement of the question presented. Rather, the undisputed evidence clearly shows that the incident occurred during a struggle which occurred *after* the Richardson vehicle had been stopped by a police blockade and his automobile flight terminated. Not only had the flight been terminated, but Richardson had refused orders to get out of his automobile and had been removed from the automobile by Indianapolis Police Officer Richard Blake and Marion County Deputy Sheriff Corporal Mark Myler. It was after Richardson had been removed from the automobile by the two officers and was being led away from it that Richardson began to struggle with the two officers and the gun discharged.

In any event, the conduct of Speedway Police Officers Phil Smith and Robert Fouty could not have proximately caused Richardson's death. Neither Smith nor Fouty drew their firearms at any time; nor did they participate in the removal of Richardson from his car; nor were they participants in Richardson's struggle with Officers Richard Blake and Mark Myler.

During the automobile pursuit of Richardson, Smith and Fouty communicated only with their own dispatcher. They had observed Richardson committing a misdemeanor in their presence, had probable cause to effect an arrest, and were in fresh pursuit of Richardson to make that arrest. Officers Smith and Fouty signaled Richardson to stop, but instead, Richardson chose to avoid arrest by fleeing in his automobile. There was no evidence that the fresh pursuit of Richardson was unlawful. No injury to Richardson or damage to property resulted from the chase. Consequently, the chase itself did not violate any of Richardson's constitutional rights. Finally, it must be noted that the jury was permitted to determine whether the conduct of Officer Blake, the police officer whose gun discharged, proximately caused a violation of Richardson's constitutionally protected rights. The jury returned a verdict for Police Officer Blake and found there was no violation of Richardson's civil rights. If Blake's conduct did not violate Richardson's civil rights, then certainly Officers Smith and Fouty could not have violated Richardson's constitutional rights by participation in the automobile chase.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

SMITH, MALEY & DOUGLAS
Eugene O. Maley
Attorneys for Respondents,
Phil Smith and Robert Fouty

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 80-1285

TANDY RICHARDSON, JR., Administrator of the Estate of BYRON, L. RICHARDSON, Deceased,

Plaintiff-Appellant,

v.

THE CITY OF INDIANAPOLIS, A Municipal Corporation in the State of Indiana; MARION COUNTY SHERIFF'S DEPARTMENT, Marion County, Indiana; MARK MYLER, ROBERT YARNELL, SCHUYLER ATKINS and LINDEN K. LUCAS, Individually and as Deputy Sheriffs of the Marion County Sheriff's Department, Marion County, Indiana; INDIANAPOLIS POLICE DEPARTMENT, Indianapolis, Indiana; RICHARD BLAKE, Individually and as a Police Officer of the Police Department of the City of Indianapolis; and PHIL SMITH and ROBERT FOUTY, Individually and as Police Officers of the Police Department of Speedway, Indiana,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis, Division.
No. IP 77-281-C—**Cale J. Holder**, *Judge.*

ARGUED JANUARY 19, 1981—DECIDED AUGUST 25, 1981

Before FAIRCHILD, PELL and SPRECHER, *Circuit Judges.*

PELL, *Circuit Judge.* Byron L. Richardson was shot and killed in a struggle with an Indianapolis police officer in the course of his arrest following a high speed automobile chase. The plaintiff, Tandy Richardson, Jr., the decedent's personal representative, appeals from a judgment of the United States District Court for the Southern District of Indiana which granted a directed verdict against him on his claim under 42 U.S.C. §1983, in favor of the defendants, the City of Indianapolis; the Indianapolis Police Department (I.P.D.); the Marion County Sheriff's Department; Mark Myler, Robert Yarnell, Schuyler Atkins, and Linden Lucas, individually and as Deputy Sheriffs of Marion County; Phil Smith and Robert Fouty, individually and as police officers of the Police Department of Speedway, Indiana (referred to collectively as the non-shooting defendants). The plaintiff also appeals from the directed verdict in favor of Richard Blake, as a Police Officer of Indianapolis, Indiana, and from a jury verdict in favor of the defendant Richard Blake individually (the shooting defendant).

As to the non-shooting defendants, the plaintiff contends that the trial court erred by weighing the evidence and substituting its judgment for that of the jury, and thereby removed from jury consideration questions upon which reasonable jurors could have disagreed. As to the shooting defendant Blake, the plaintiff alleges that the trial court committed several errors; first, that the court granted improperly a directed verdict in favor of Blake "as a Police Officer of the City of Indianapolis"; second, that the court wrongfully denied a directed verdict against Blake at the close of all the evidence; third, that the court improperly instructed the jury; fourth, that the court improperly refused the plaintiff's tendered jury instructions; and fifth, that the court failed to excuse a juror for cause when it should have done so. The plaintiff also contends that the trial court erred by excluding from the evidence a

paternity judgment relating to the decedent's illegitimate child. The plaintiff also seeks award of attorney's fees under 42 U.S.C. §1988.

I.

At 1:12 a.m., May 14, 1975, Indianapolis Police Officer Richard Blake issued a speeding ticket to the decedent, Byron Richardson. Some 45 minutes later, Blake, who had remained at the same location, observed the Richardson car again speed past. Blake pursued the car, and alerted the dispatcher of the Indianapolis Police Department. This broadcast was heard by other police officers of surrounding jurisdictions who joined the pursuit, which reached speeds of up to 100 miles per hour. The pursuers attempted to slow or to stop Richardson, but he eluded them until two Sheriff's Department squad cards blocked a roadway on a exit ramp at the Indianapolis International Airport, whereupon Richardson stopped his vehicle. The pursuing vehicles surrounded Richardson's car, and several officers got out of their cars and approached cautiously. At least three of the officers had their handguns drawn. Blake and another officer ordered Richardson out of the car. He responded only by laughing. Blake and Corporal Myler of the Marion County Sheriff's Department approached the car with their guns drawn. All the other officers reholstered their guns at this point. Blake and Myler removed Richardson from the car. Blake used his left hand only, keeping his revolver, pointing skyward, in his right hand. Richardson began to struggle with the two officers. Blake's gun discharged, striking Richardson in the head. Richardson died immediately. His personal representative filed this suit alleging that the defendants had unconstitutionally deprived the decedent of his rights under color of state law in violation of 42 U.S.C. §1983. The trial court granted a directed verdict in favor of the non-shooting defendants, and in favor of Blake as a police officer, and a jury found in favor of Blake acting as an

individual. The plaintiff appeals from the judgment entered on those verdicts.

II.

The plaintiff's first assignment of error is that the trial court improperly granted a directed verdict in favor of the non-shooting defendants and the shooting defendant in his capacity as an officer of the I.P.D. The plaintiff contends that the trial court failed to follow the proper rule concerning the grant of a directed verdict, which requires that the trial court view the evidence and make all inferences in the light most favorable to the non-moving party, and that if reasonable jurors could differ on the conclusions drawn therefrom, the case must go to the jury. *See, e.g., Hampton v. Hanrahan*, 600 F.2d 600, 607-08 (7th Cir. 1979), *rev'd in part on other grounds*, 446 U.S. 754 (1980). While this is the proper formulation of the directed verdict standard, it is nonetheless clear that the trial judge must determine whether the party with the burden of proof has produced sufficient evidence upon which a jury could properly proceed to a verdict, and that a mere scintilla of evidence will not suffice. *Hohmann v. Packard Instrument Co.*, 471 F.2d 815, 819 (7th Cir. 1973). Thus on appeal the party against whom a verdict has been directed has the onus of demonstrating the existence of a conflict in the evidence or the inferences to be drawn therefrom sufficient to justify submission of the question to the jury. *Krivo Industrial Supply Co. v. National Distillers & Chemical Corp.*, 483 F.2d 1098, 1102 (5th Cir. 1973).

We turn therefore to each of the plaintiff's claims in turn to determine whether there was evidence upon which reasonable jurors could have disagreed.

The first category of issues relates to the participation in the high-speed pursuit. The plaintiff's complaint asserted that the governmental and police force defendants wrongfully failed to interrupt the high-speed chase and

thereby participated in the exercise of unreasonable and excessive force in violation of the decedent's civil rights; that the City of Indianapolis and its police force wrongfully exerted such force by inviting and encouraging the other defendants to join in the chase; that the Indianapolis defendants should have known that no high-speed chase was necessary because they knew the decedent's name and address from the earlier speeding ticket and thus could have picked him up later, and that therefore the continuation of the chase was exertion of unreasonable and excessive force; that the other defendants exerted such force by joining the chase in the absence of information that a warrant was out for the defendant or that he was being pursued for the commission of a felony.

The trial court made the following findings of fact and conclusions of law on the high-speed chase issue:

> while engaging in...high speed flight decedent was pursued by multiple police officers of various police agencies in the proximity of the roads and highways used by decedent in the flight of decedent in his vehicle. During such flight the decedent committed other alleged misdemeanor traffic violations of reckless driving, speeding and failing to obey multiple police officers' orders to decedent to stop his motor vehicle.
>
> ...It was the legal obligation of the defendant officers to arrest the decedent for the many violations of the Motor Vehicle Code of Indiana. It was the duty of the decedent to stop his vehicle when he was signaled to stop by each and all of the defendant officers. It was the duty of the defendant governmental units and agencies to instruct their employee defendant officers to pursue the decedent when he resorted to high speed evasive flight to avoid arrest for each of his crimes and for inter agency cooperation to apprehend.
>
> No property damage or personal injuries were incurred by decedent in the defendants' pursuit of

> decedent in his high speed evasive flight to avoid arrest.

The court then concluded that the plaintiff had failed to prove all of the essential elements and alleged facts of the complaint as to the non-shooting defendants. We agree.

There was no evidence in the record upon which a reasonable juror could conclude that the high-speed chase was the proximate cause of any violation of the decedent's constitutional rights. The chase had terminated without injury to the decedent, before the occurrence which caused his death, and therefore no liability for participation in the chase can attach. Furthermore, there was no evidence in the record that the chase was unlawful, but rather what evidence there was established that it was appropriate under the laws of the State of Indiana and the policies of the respective defendants for the officers to pursue a person who had committed a misdemeanor in their presence, and to assist another officer in so doing, regardless of whether a warrant had been issued. IND. CODE §18-1-11-4 (Burns). Additionally, no evidence was produced that the Indianapolis defendants invited or encouraged the other defendants to join the pursuit; what evidence there was established rather that each officer communicated only with his own dispatcher. The grant of the directed verdict was thus proper on the issue of the high-speed chase.

The next group of issues removed from jury consideration relates to the firearms policy of the defendant police departments, and the failure of the departments to discipline officers for excessive use of force. The plaintiff's brief does not raise the issue of firearms policy, and the question of discipline policy, while alluded to in the plaintiff's brief to this court, was withdrawn from consideration by the plaintiff below. We will treat neither of these issues, therefore, as neither is properly before this court.

The next group of issues relates to the negligent assignment of Officer Blake to a motor vehicle, and the

negligent hiring of Deputy Sheriff Myler. The plaintiff submitted exhibits designed to prove the above, but the trial court excluded them on relevance grounds. The plaintiff has not briefed grounds before this court on which that exclusion is claimed to be erroneous. Furthermore, we need not reach the question in light of our affirmance of the district court finding that there was no evidence establishing that the chase proximately caused injury to the decedent, and therefore no reason to examine the driving records of the officers involved.

The plaintiff's next claim is that the non-shooting defendants violated the decedent's rights by failing to act affirmatively to prevent Officer Blake from shooting the decedent. This charge assumes that the shooting officer acted in a manner that violated the decedent's civil rights. The jury properly determined that issue to the contrary, however, *see infra*, and thus there can be no liability on the part of the non-shooters for failure to prevent what the jury determined was not a violation. We note, however, that unlike *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979), and *Byrd v. Brishke*, 466 F.2d 6 (7th Cir. 1972), this was not a case where there was time for the other officers to intervene, but rather presented a situation like that in *Russ v. Ratliff*, 538 F.2d 799 (8th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977), where the court sustained a verdict in favor of an officer who could not have intervened because the challenged events occurred within a few seconds.

The plaintiff's final claim on the directed verdict as to the non-shooters is the claim that the defendants conspired to violate the decedent's civil rights. The plaintiff relies on language from *Hampton v. Hanrahan*, 600 F.2d at 620-21, to establish that such a conspiracy need not be based on an express agreement, and that its existence can be inferred from circumstantial evidence. *Hampton* was explicit, however, in stating precisely what elements were required to establish the existence of a civil conspiracy:

> [A] combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties 'to inflict a wrong against or injury upon another,' and 'an overt act that results in damages.'

Id. at 620-21, *quoting Rotermund v. United States Steel Corp.*, 474 F.2d 1139 (8th Cir. 1973). Because the jury determined that no violation of the decedent's civil rights had taken place as to the shooting defendant, there obviously could have been no agreement to violate those rights by the non-shooting defendants. Thus, the element of infliction of a legally cognizable wrong is absent. Furthermore, as we noted above, there was no evidence of any communication between the officers which might give rise to any inference of agreement to commit any acts, wrongful or otherwise. As this court remarked in *Hoffman-LaRoche, Inc. v. Greenberg*, 447 F.2d 872, 875 (7th Cir. 1971),

> [c]ircumstantial evidence may provide adequate proof of conspiracy. The law does not demand proof that each conspirator knew the exact limits of the illegal plan or the identity of all participants therein. But it does require that there be a single plan, the essential nature and general scope of which is known to each person who is to be held responsible for its consequences.

See Simms v. Reiner, 419 F. Supp. 468 (N.D. Ill. 1976) ("Mere unsupported conclusions and inferences are insufficient to support a charge of conspiracy."). Absent any evidence of a plan to deprive the decedent of his civil rights, the conspiracy allegation could not go to the jury.

We therefore conclude that the trial court did not err in directing a verdict as to all of the non-shooting defendants.

III.

The plaintiff further contends that the trial court erred by granting a directed verdict in favor of Officer Blake in his capacity as a Police Officer of the City of Indianapolis.

In explaining his rationale for dismissing the case against Blake in his official capacity, the trial court stated that under the rule of *Monell v. Department of Social Services*, 436 U.S. 658 (1976), damages on a theory of respondeat superior could only be awarded against the City of Indianapolis or the Indianapolis Police Department if Blake had been acting pursuant to a policy, custom, or usage of the city or the department, and that the only purpose in naming Blake in his official capacity was to obtain such liability against the city or the department. The court found, however, that there was no evidence that Blake was acting pursuant to any policy or custom of the city or the department when his gun discharged, and that there had been no evidence, in fact, presented as to any policy whatsoever relating to the use of firearms. The plaintiff has presented no argument on appeal that challenges that finding, and this court has not found such evidence on review of the record. Under the *Monell* rule, actions for damages against a party in his official capacity are in essence actions against the governmental entity of which the officer is an agent, 436 U.S. at 690, n.55, and damages could only be awarded against a defendant in his official capacity if they would be available against the governmental agency itself. *Id.; Familias Unidas v. Briscoe*, 619 F.2d 391, 403 (5th Cir. 1980). Thus it was appropriate to limit the jury consideration of Blake's liability to the question whether he individually had violated the decedent's civil rights while acting under color of state law, i.e., clothed with the authority, but acting beyond the proper scope, of an Indianapolis police officer. *Monroe v. Pape*, 365 U.S. 167, 187 (1961).

IV.

The plaintiff further contends that the trial court erred on several grounds in rulings relating to the continuation of the trial following the grant of the directed verdict for all the defendants except Blake individually. We will examine each of those contentions in turn.

The plaintiff claims the trial court erred by refusing to grant a directed verdict against Blake at the close of the evidence on a theory that his use of his gun was excessive force. Keeping in mind the rule that such a verdict is only appropriate when the evidence, viewed in the light most favorable to the non-moving party, is such that reasonable jurors could not differ on the conclusion of the issue, *Hohmann v. Packard Instrument Co.*, 471 F.2d at 819, we must affirm on this ground as well. The plaintiff relies on two cases, *Russ v. Ratliff*, 538 F.2d 799 (8th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977), and *Clark v. Ziedonis*, 513 F.2d 79 (7th Cir. 1975), to establish that the use of deadly force is only justified when an officer needs it for self defense, or to control a prisoner, or when such force is necessary to effect an arrest. As the subsequent jury verdict would indicate, reasonable jurors could in fact have placed a different interpretation on the evidence, and would have been justified in believing that the display of a firearm in the circumstances was not inappropriate and that it fired by accident.

The plaintiff's next objection is that the court erred by giving instruction number 24.[1] The plaintiff objected to the

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[1]Instruction 24 was given as follows:

INSTRUCTION NO. 24.

The violation of a person's civil rights by wrongfully and illegally shooting and killing him as charged by the plaintiff's complaint as amended involves an intentional act by a person or persons to violate those civil rights; that is in this case, that a police officer's act which resulted in the death of Byron Richardson must have been intentional

(Footnote continued on following page)

instruction at the trial on two grounds: first, that it "does not make clear that the violation of the rights of the decedent could take place by the reckless and careless manner in which the defendant Blake conducted his activities," and second, that the last two paragraphs "concern themselves with negligence or lack thereof on the part of the police officers. This issue of negligence has not been joined in this case, is beyond the scope of the pleadings and the issues, and should not be read to the jury."

We are not persuaded by the plaintiff's first objection, which asserts that the instruction as given would required that the defendant "be guilty of first degree murder before you would be justified in finding him guilty of violating the decedent's constitutional rights," and thus that the plaintiff was not allowed to instruct the jury on recklessness. The plaintiff relies on *Kerr v. City of Chicago*, 424 F.2d 1134,

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or motivated by maliciousness or by a callous disregard for the consequences.

In determining whether or not a charged police officer was guilty of an intentional, malicious or callous deprivation of Byron Richardson's civil rights by intentionally or purposefully shooting at him or intentionally and purposefully killing him, you must consider the then existing circumstances taking into account the acts or actions, demeanor and manner and conduct of Byron Richardson and of every person leading up to and immediately prior to the firing of defendant Blake's service revolver and whether there then existed any intent of any person of intentionally or purposefully shooting or killing Byron Richardson.

If you should find and believe from a preponderance of the evidence that the shooting and/or killing of Byron Richardson by defendant Blake was unintended, and was in fact accidental, that finding by you would warrant your finding for defendant.

The mere fact that you may feel or believe that one or more of the police officers was negligent in his handling of the stopping and arrest of Byron Richardson would not permit you to find for the plaintiff and against a defendant.

Therefore, you may not determine a verdict for the plaintiff for the death of Byron Richardson under the evidence in this case based upon the legal theory of negligence since it is not an issue for your consideration and negligence does not support the complaint's theory of willful misconduct.

1140 (7th Cir.), *cert. denied sub nom. Mohan v. Kerr*, 400 U.S. 833 (1970), to establish that no specific intent or purpose to deprive the plaintiff of his rights is required. While this is a perfectly valid statement of the law, *Monroe v. Pape*, 365 U.S. 167, 187 (1961), it ignores the fact that the trial court's instruction here properly went on to state that liability could be premised on the basis of the defendant's "callous disregard for the consequences." This may not be a model or ideal recklessness instruction; however we find it an adequate and understandable formulation of the recklessness standard on which the plaintiff premised his case. *See Beard v. Mitchell*, 604 F.2d 485, 494 (7th Cir. 1979) ("conscious disregard" definition of recklessness was not prejudicial error).[2] Furthermore, the plaintiff had a full opportunity to explain his theory of the case to the jury at closing argument, and used that opportunity to elaborate on the "callous disregard" formulation of the recklessness theory, as contained in the court's instruction as actually given. *See Alloy International Co. v. Hoover NSK Bearing Co.*, 635 F.2d 1222, 1226-27 (7th Cir. 1980); *Beard*, 604 F.2d at 493 N.8.

The plaintiff's second objection to instruction 24, that it injected the issue of negligence into the case and thereby confused the jury is similarly without merit. The cited language could have had no effect other than precisely the opposite of what the plaintiff now contends, for it explicitly removes the issue of negligence from jury consideration.[3]

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[2]Similarly, therefore, it was not error for the court to reject the plaintiff's proffered instruction Number 21, which read:

> The fact that the defendants had no specific intent or purpose to deprive plaintiff's decedent, Byron Levell Richardson, of his constitutional rights will not absolve them from liability if they did in fact deprive him of those rights.

Because we find that instruction 24 properly instructed the jury on the substance of the plaintiff's recklessness theory, we find no error in the refusal to give this instruction. *Brandes v. Burbank*, 613 F.2d 658, 668-69 (7th Cir. 1980).

[3]As the plaintiff conceded in his brief and at oral argument, this was not a case where negligence was pleaded or proved, and thus we need not reach any questions presented by *Parratt v. Taylor*, 101 S. Ct. 1908 (1981).

We note that a copy of the instructions was given to the jury to consider in their deliberations and that the trial judge admonished the jury to refer to the written instructions if they did not remember the court's oral recitation. It is thus implausible in the extreme that this language could have had the precisely opposite effect from its clear import, and we will not find it reversible error in the absence of a showing of prejudice.

The plaintiff also contends that the court erred by giving instruction number 14 to the jury. That instruction listed certain traffic laws of the State of Indiana which the decedent was alleged to have broken. We find no merit in the contention that the giving of these instructions either confused the jury or prejudiced the plaintiff by implying that if the decedent had violated traffic laws recovery would be foreclosed. The issue of the validity of the high-speed chase had been placed squarely in issue by the plaintiff's theory of the case, and the cited laws were relevant to determination of whether the defendant was acting improperly in chasing the decedent. We find no prejudice or confusion in the instruction given. *See, e.g., Cavendish v. Sunoco Service, Inc.*, 451 F.2d 1360, 1367 (7th Cir. 1971).

The plaintiff also contends that the court erred by refusing to give plaintiff's instructions numbers 1 to 26. Fed. R. Civ. P. 51 requires that objections to the refusal to give instructions must be made before the jury retires to consider its verdict, and that the grounds for objection be stated with specificity. The plaintiff's blanket objection, without stated grounds, made after the jury had retired, must fall on both prongs of the Rule 51 test, and the trial court properly rejected it. *See Durant v. Surety Homes Corp.*, 582 F.2d 1081, 1086 (7th Cir. 1978).

The plaintiff's next assignment of error is that the trial court erred by failing to excuse for cause a prospective juror who had, as a bank trust officer, worked prior to his

retirement with other attorneys who were members of the firm which represented all but two of the defendants, including Blake. A trial court had broad discretion in impaneling a jury, *Dennis v. United States*, 339 U.S. 162, 168 (1950), and therefore our review is limited to the determination of whether there was an abuse of that discretion. The trial court vigorously and thoroughly questioned the prospective juror and found to its satisfaction that there was no potential for prejudice. The mere fact that a juror has had some contact or acquaintance with a member of a firm is not a per se basis for exclusion, and the court was within the limits of its discretion in seating the challenged juror. *Peerless Insurance Co. v. Schnaider*, 290 F.2d 607, 710 (5th Cir.), *cert. denied*, 368 U.S. 830 (1961); *see Lane v. United States*, 321 F.2d 573 (5th Cir. 1963), *cert. denied*, 377 U.S. 936 (1964).

The plaintiff also contends that the trial court erred in excluding evidence relating to the paternity of the decedent's illegitimate child, and by refusing an instruction on punitive damages. In light of our ruling above on liability, we need reach neither of these questions, both of which relate solely to the issue of damages.

V.

Finally, the plaintiff seeks the award of costs and attorney's fees under 42 U.S.C. § 1988, which by its terms allows the prevailing party in a proceeding to enforce 42 U.S.C. §1983 a reasonable attorney's fee as part of the cost. Because the plaintiff has not prevailed in the trial court or on appeal such an award would be inappropriate and is denied.

VI.

The court has examined such other arguments as made by the plaintiff and finds them without merit. Therefore, and in accord with the foregoing reasons, the judgment is affirmed.

FAIRCHILD, *Circuit Judge, concurring.* I join in the court's opinion except as to Part III.

The district court properly dismissed the Indianapolis Police Department and the City of Indianapolis as defendants because of plaintiff's failure to offer evidence showing that Blake was acting pursuant to any policy or custom of the city or department when his gun discharged. Regardless of whether naming Blake in his official capacity as a defendant would serve to plead an action against the department or city, as suggested by *Monell v. Department of Social Services*, 436 U.S. 658, 690 n. 55 (1976), in this case naming Blake in his official capacity is surplusage and meaningless because the city and department were also named as defendants. Because the dismissal of the city and department were proper, the dismissal of Blake in his official capacity had no additional effect and was not improper.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

TANDY RIRCHARDSON, JR., as Administrator of the Estate of BYRON L. RICHARDSON, Deceased.	)	
v.	)	No. IP 77-281-C
THE STATE OF INDIANA:	)	
INDIANA STATE POLICE DEPARTMENT;	)	
JOHN Doe, as an Officer of the Indiana State Police Department;	)	
JOHN DOE, as an Individual;	)	
THE CITY OF INDIANAPOLIS, as a Municipal Corporation in the State of Indiana;	)	
INDIANAPOLIS POLICE DEPARTMENT OF THE CITY OF INDIANAPOLIS, a Municipal Corporation in the State of Indiana;	)	
RICHARD BLAKE, as an Officer of Indianapolis Police Department, a Municipal Corporation in the State of Indiana;	)	
RICHARD BLAKE, as an Individual;	)	

MARION COUNTY SHERIFF DEPARTMENT OF MARION COUNTY, in the State of Indiana;

MARK MYLER, ROBERT YARNELL, SCHUYLER ATKINS, and LINDEN K. LUCAS, as Officers of the Marion County Sheriff Department of Marion County, in the State of Indiana;

MARK MYLER, ROBERT YARNELL, SCHUYLER ATKINS, and LINDEN K. LUCAS, as Individuals;

SPEEDWAY POLICE DEPARTMENT OF SPEEDWAY, a Municipal Corporation in the State of Indiana;

PHIL SMITH, and ROBERT FOUTY, as Officers of the Speedway Police Department of Speedway; a Municipal Corporation in the State of Indiana;

PHIL SMITH, and ROBERT FOUTY, as Individuals.

FINDINGS OF FACT CONCLUSIONS OF LAW AND JUDGMENTS ON RULE 50 FEDERAL RULES OF CIVIL PROCEDURE MOTION

The action was commenced by the plaintiff's filing of a complaint against the defendants on May 13, 1977. Motions for summary judgment of the State of Indiana; Indiana State Police Department; John Doe, as an Officer of the Indiana State Police Department; and John Doe, as an Individual; were sustained and the action was dismissed as to those defendants. Motions for summary judgment of the other defendants were denied. After multiple pre-trial conferences by the Magistrate and the Court and continuances of scheduled trial dates of November 7, 1977, March 20, 1978, October 30, 1978, the scheduled trial of March 12, 1979 was ruled a mistrial after two days of trial on a motion of the defendants when a juror volunteered upon seeing a witness on the second day of the trial that she was personally acquainted with the mother of the decedent named in the complaint under her maiden name. Motions for partial summary judgment were filed on limited issues and processed between the time of the mistrial of March 13, 1979 and January 21, 1980. The Court conducted a pre-trial conference on January 21, 1980. The scheduled jury trial, that lasted eleven days, was commenced on January 22, 1980 and continued through January 24, 1980, resumed on January 28, 1980 and continued through January 31, 1980, resumed on February 4, 1980 and resumed on February 6, 1980 and continued through February 8, 1980 when the jury returned a verdict for the one remaining defendant, Richard Blake, as an individual, and against the plaintiff. At the close of all of the plaintiff's evidence on February 4, 1980, all defendants filed Rule 50 Federal Rules of Civil Procedure motions for a directed verdict for each of the defendants. The motion of the defendant, Richard Blake, as

an individual, was denied in part and the trial proceeded as to the remaining issues against Richard Blake, as an individual. The motions of all other defendants, than Richard Blake, as an individual, were sustained and the plaintiff's action against all defendants other than Richard Blake, as an individual, was dismissed with prejudice on the merits.

The trial was upon the issues of the plaintiff's complaint of May 13, 1977 as amended on October 7, 1977, April 21, 1978, October 11, 1978, March 5, 1979, January 23, 1980 and during the trial and the answer of the defendants consisting of admissions and denials. The plaintiff's amended complaint charged that each of the defendants did, and/or such defendants did conspire and agreed between themselves and others unknown to plaintiff, to deprive the plaintiff's decedent under color of the laws of the State of Indiana, its counties and its cities and their police departments of his rights, privileges and immunities of the right to life, liberty, due process and the equal protection of the laws guaranteed under the Fourteenth Amendment to the Constitution of the United States of America and under Title 42 United States Code Sections 1983 and 1985 and/or because of his race or color in the following specifications (A) through (M):

A) Each of the governmental defendants and their police departments wrongfully maintained a policy of not having a policy, and/or enforcement of a policy which would discourage and counsel its employees against high speed motor vehicles chases, which charge was withdrawn by the plaintiff on the record on January 29, 1980, and/or

B) Each of the governmental defendants and their police departments wrongfully failed to interrupt and order the cessation of the high speed chase and thereby participated in the exercise of unreasonable and excessive force and judgment of Officer Richard Blake in making and conducting such high speed chase in violation of Title

42 United States Code Section 1983 and the Fourteenth Amendment to the Constitution of the United States of America, and/or

C) Each of the governmental defendants and their police departments wrongfully maintained a policy of having no consistent, uniform and understandable policy regarding the display and use of firearms in violation of Title 42 United States Code Section 1983 and the Fourteenth Amendment to the Constitution of the United States of America, and/or

D) Each of the governmental defendants and their police departments wrongfully maintained a policy of not disciplining their police officers who use and exert unreasonable force during the course of both apprehending and arresting citizens, which charge was withdrawn by the plaintiff on the record on January 29, 1980, and/or

E) The City of Indianapolis and its police department wrongfully exerted unreasonable and excessive force by inviting and encouraging the other governmental defendants and their police departments to have their personnel to join in, participate and engage in such high speed chase of the decedent in violation of Title 42 United States Code Section 1983 and the Fourteenth Amendment to the Constitution of the United States of America, and/or

F) The City of Indianapolis and its police department wrongfully made a duty assignment to Officer Richard Blake that required the use of a motor vehicle in the execution of such City's duty to provide enforcement of the criminal laws in violation of Title 42 United States Code Section 1983, and/or

G) The Marion County Sheriff Department wrongfully appointing Officer Mark Myler to the office to enforce the criminal laws in violation of Title 42 United States Code Section 1983, and/or

H) The defendants, The City of Indianapolis,

Indianapolis Police Department, and Richard Blake, as such police officer and individually, knew or should have known that no high speed chase was necessary in order to apprehend Mr. Richardson, and from the point such became known or should have been known further involvement in and continuation of such high speed chase was an exertion of unreasonable and excessive force in violation of Title 42 United States Code Section 1983, and/or

I) Each of the defendants exerted unreasonable and excessive force when they became involved in such high speed chase of Mr. Richardson in the absence of information that a law enforcement officer was in possession of a warrant for the arrest of Mr. Richardson, or that he was being pursued based on probable cause to believe that he had committed a felony crime in violation of Title 42 United States Code Section 1983 and the Fourteenth Amendment to the Constitution of the United States of America, and/or

J) Each of the defendants that were present at the scene of the stopping of Mr. Richardson's vehicle who failed to affirmatively act in a manner to prevent the shooting of Mr. Richardson and thus exerted unreasonable and excessive force in violation of Title 42 United States Code Section 1983, and/or

K) The shooting of Mr. Richardson by defendants was an exertion of unreasonable and excessive force in violation of Title 42 United States Code Section 1983 and Title 42 United States Code Section 1985, and/or

L) The defendant, Richard Blake, as such officer and/or as an individual, wrongfully exerted excessive and unreasonable force in engaging in a high speed chase of Mr. Richardson in violation of Title 42 United States Code Section 1983, and/or

M) The shooting of Mr. Richardson by Richard Blake was an exertion of unreasonable and excessive force in violation of Title 42 United States Code Section 1983.

The defendants each filed motions for a directed verdict at the close of all of the plaintiff's evidence. The Court being fully advised in the premises sustained the motions of all of the defendants except the motion of defendant, Richard Blake, as an individual, was denied and overruled in part. Such rulings are based on the following findings of fact.

At all times in question there were certain units of government authorized and existing under the laws of the General Assembly of the State of Indiana known as The City of Indianapolis, a municipal corporation; Indianapolis Police Department of such municipal corporation, the Marion County Sheriff Department of the Sheriff of Marion County, State of Indiana, and the Town of Speedway, a municipal corporation and its Police Department; and at all times in question there was an individual known as Richard Blake who was employed as a Police Officer by such Indianapolis Police Department; at all times in question there were individuals known as Linden K. Lucas, Mark Myler, Robert Yarnell and Schuyler Atkins who were employed as Deputy Sheriffs of such Marion County Sheriff's Department; at all times in question there were the individuals known as Phil Smith and Robert Fouty who were employed as Police Officers of such Speedway Police Department; and at all times in question there was the individual known as Byron L. Richardson who at about 1:53:20 o'clock in the morning of May 14, 1975 was operating a motor vehicle at a high rate of speed in violation of the law regulating speed of vehicles west of 38th Street, a public street and highway, near where such street was intersected by Lafayette Road in Marion County, Indiana, when such Officer Blake while in uniform and operating a marked police vehicle of his employer in the performance of his duty intended to arrest Mr. Richardson for a misdemeanor violation of the law

notified Mr. Richardson to stop by the use of the red light and siren and Mr. Richardson refused to stop his vehicle and a high speed chase ensued at all times on public streets and highways, that is, west on 38th Street thence south on Interstate I-465 to its exit at West Washington Street, during which time pursuant to Officer Blake's notifying his employer by radio of the chase and the other law enforcement agencies and their employees joined in the chase after which Mr. Richardson operated his vehicle west on West Washington Street thence south on High School Road and thence west into the Indianapolis International Airport and upon the upper motor vehicle ramp at high speed still pursued by Officer Blake and certain of such other officers and deputies deployed to intercept Mr. Richardson's vehicle by establishing a "roadblock" of the east bound traffic roadway leading from the airport and when Mr. Richardson stopped his vehicle at the "roadblock" on or near the east bound Terminal Drive and South High School Road, Officer Blake stopped his vehicle to the rear of Mr. Richardson's vehicle where Officer Blake alighted with his 38 caliber service handgun drawn and in his right hand approached the left door of Mr. Richardson's vehicle and physically removed Mr. Richardson from his vehicle with his left hand and a projectile from Officer Blake's gun struck Mr. Richardson in the head and from which wound Mr. Richardson then and there died, all of which occurred while Mr. Richardson was surrounded by the uniformed named individual police officers and deputy sheriffs; that thereafter Tandy Richardson, Jr., the father of the decedent, made application for and was duly appointed under the law of Indiana as the administrator and the personal representative of the estate of Byron L. Richardson, deceased, for the purpose of this action only; and that decedent, Mr. Richardson, was nineteen years of age at the time of his death, left no surviving widow and no surviving dependent next of kin.

The nineteen year old decedent, a recent honorably discharged United States Navy veteran and father of a twenty-eight day old illegitimate child, engaged in a high speed motor vehicle flight for some reason known only to decedent, except that a radar police officer signaled decedent to stop his vehicle because of a misdemeanor traffic violation in the early morning hours of May 14, 1975 being an alleged second traffic violation of which decedent was accused within a matter of about 0.41 minutes and 20 seconds at about the same location. Sometime thereafter decedent stopped his vehicle of necessity because of a police motor vehicle barricade. While engaging in such high speed flight decedent was pursued by multiple police officers of various police agencies in the proximity of the roads and highways used by decedent in the flight of decedent in his vehicle. During such flight the decedent committed other alleged misdemeanor traffic violations of reckless driving, speeding and failing to obey multiple police officers' orders to decedent to stop his motor vehicle. Decedent after being forceably stopped by such barricade failed to obey the orders of certain of the police to disclose his hands as he sat in his stopped vehicle at the barricade and/or to get out of his vehicle with hands disclosed while various officers had their service revolvers trained upon decedent in his stopped vehicle. Indianapolis Police Officer, Richard Blake, opened the driver's door and physically pulled decedent from his vehicle which officer had his service revolver in his right hand, faced the decedent to the west with his left hand gripping the left arm of decedent and at the same time such officer had his gun pointed skyward behind the head of decedent with the butt of the gun on the level of decedent's shoulder and at the same time an officer of another police agency came to the aid of Officer Blake which officer also had a gun in his right hand and with his left hand gripped the right arm of decedent. The two officers proceeded to physically direct decedent westward toward a police motor vehicle stopped to the rear of decedent's vehicle. Decedent tried to shake

loose from such officers while decedent was in such a status of physical arrest and Officer Blake then and there shot and killed the decedent. The Court finds under the circumstances known to Officer Blake and the emergency conditions facing Officer Blake of the unknown reactions of decedent to his being arrested Officer Blake unholstered his gun should its used be reasonably required to protect himself from imminent bodily harm and the decedent sought to break loose and/or flee from physical custody of the two officers and that such conduct of decedent proximately caused the gun of Officer Blake to be accidentally and unintentionally discharged and that Officer Blake did not use excessive force against such decedent, Bryon Richardson. However, the issue is a jury question as to the alleged legal fault of Officer Blake.

The governmental units and agencies correctly instructed their employee officers in the use of the weapons furnished such officers by such governmental units and agencies. The governmental units and agencies correctly instructed their employee officers in the matter of probable cause for arresting misdemeanors. It was the legal obligation of the defendant officers to arrest the decedent for the many violations of the Motor Vehicle Code of Indiana. It was the duty of decedent to stop his vehicle when he was signaled to stop by each and all of the defendant officers. It was the duty of the defendant governmental units and agencies to instruct their employee defendant officers to pursue the decedent when he resorted to high speed evasive flight to avoid arrest for each of his crimes and for inter agency cooperation to apprehend.

No property damage or personal injuries were incurred by decedent in the defendants' pursuit of decedent in his high speed evasive flight to avoid arrest.

The proximate cause of the shooting of and the death of Mr. Richardson and the alleged damages incurred by the plaintiff was not due to the alleged acts or omissions of the defendant governmental units and agencies and of the defendant employee officers. However, the issue of such

happening being proximately caused by the alleged conduct of the defendant, Richard Blake, as an individual, is a jury question.

The Court has jurisdiction of the parties and subject matter of the action.

The plaintiff has failed to prove all of the essential legal elements and the alleged facts of such legal elements of the complaint as to The City of Indianapolis, Indiana; the Indianapolis Police Department of Indianapolis, Indiana; Richard Blake, as an Officer of the Indianapolis Police Department; Marion County Sheriff Department of the State of Indiana; Mark Myler, Robert Yarnell, Schuyler Atkins and Linden K. Lucas, as individuals and as Officers of the Marion County Sheriff Department of the State of Indiana; Speedway Police Department of Speedway, Indiana; and Phil Smith and Robert Fouty, as individuals and as Officers of the Speedway Police Department of Speedway, Indiana. These defendants did not violate the civil rights of Byron L. Richardson, deceased. These defendants did not deprive Byron L. Richardson under color of the laws of the State of Indiana of his rights, privileges and immunities of the right to life, liberty, to due process and equal protection of the laws guaranteed him under the Fourteenth Amendment to the Constitution of the United States of America and under Title 42 United States Code Sections 1983 and 1985. The alleged acts and omissions of these defendants listed in the findings and the complaint as amended as Items B, C, E through M (Items A and D were withdrawn by plaintiff as found) did not promixately cause the happening, that is, the shooting and killing of Mr. Richardson and the alleged damages of the plaintiff.

The plaintiff has failed to prove all of the essential elements of the complaint dealing with the alleged wrongs of defendant, Richard Blake, as an individual, listed as Items H through J and L in these findings and plaintiff's complaint as amended. (Items A and D have been voluntarily withdrawn from the issues by the plaintiff as

set forth in these findings. Items listed as B, C, E, F and G pertain to other defendants than defendant, Richard Blake, as an individual.) Such defendant did not deprive Byron L. Richardson under color of the laws of the State of Indiana of his right to life, liberty, to due process and equal protection of the laws guaranteed him under the Fourteenth Amendment to the Constitution of the United States of America and under Title 42 United States Code Sections 1983 and 1985. Such alleged acts and omissions of this defendant listed in the findings and the complaint as amended as Items H, I, J and L did not proximately cause the happening, that is, the shooting and killing of Mr. Richardson and the alleged damages of the plaintiff.

There is an issue of fact to be tried by the jury of the alleged wrongful act and omission against the defendant, Richard Blake, as an individual, as listed in the findings and complaint as amended as Item M (Item K is a duplicate of Item M insofar as it charges the same alleged wrongful conduct against the defendant, Richard Blake, as an individual).

Plaintiff's medical doctor witness explained the decedent's autopsy report that there was no evidence on the body of decedent of any physical abuse other than that resulting from the gunshot wound and decedent falling to the paved roadway immediately upon being shot.

The decendent violated the following criminal laws of the State of Indiana in the presence of all of the defendant officers. IC 9-4-1-23; IC 9-4-1-24; IC 9-4-1-54; IC 9-4-1-57; IC 9-4-1-127; IC 35-21-2-1; and IC 35-21-4-1.

The defendant officer had the following powers under the found circumstances and executed their duty under such powers. IC 18-1-11-4; IC 35-1-17-1; IC 35-1-19-1; IC 35-1-19-3; and IC 35-1-19-4.

JUDGMENT

It is ADJUDGED that the motions of all defendants, except Richard Blake, as an individual, are SUSTAINED

and the plaintiff's actions, are DISMISSED with prejudice, against the defendants, The City of Indianapolis of the State of Indiana; Indianapolis Police Department of Indianapolis, Indiana; Richard Blake, as an Officer of the Indianapolis Police Department; Marion County Sheriff Department of the State of Indiana; Mark Myler, Robert Yarnell, Schuyler Atkins and Linden K. Lucas, as individuals and as Officers of the Marion County Sheriff Department of the State of Indiana; Speedway Police Department of Speedway, Indiana; and Phil Smith and Robert Fouty, as individuals and as Officers of the Speedway Police Department of Speedway, Indiana.

It is also ADJUDGED that all alleged wrongs against the defendant, Richard Blake, as an individual, except the following charge listed as Item M in the complaint as amended and the findings are WITHDRAWN from the issues for the jury trial and they are STRICKEN and DISMISSED with prejudice:

> M. The shooting of Byron Richardson, deceased by defendant, Richard Blake, as an individual, was an exertion of unreasonable and excessive force in violation of 42 U.S.C. §1983.

It is further ADJUDGED that there is evidence upon which minds of reasonable men could differ as to the shooting of Byron Richardson, deceased, by Richard Blake, was accidental and not a violation of Title 42 United States Code Section 1983 or in the exercise of unreasonable or excessive force and a violation of Title 42 United States Code Section 1983 and the motion of the defendant, Richard Blake, as an individual, to direct a verdict and dismiss such charged wrong as listed in Item M of the amended complaint is overruled and the jury trial will proceed upon such remaining issues of the complaint as amended.

Dated this 4th day of March, 1980.

/s/ Cale J. Holder, Judge, United States District Court Southern District of Indiana